INDEX

PAGE

THE FACTS 1

THE QUESTION PRESENTED 4

THE POSITION OF THE RESPONDENTS 4

ARGUMENT:

POINT I—No decision of this Court prior to *First National Bank of Boston* v. *Maine* permitted a tax under the circumstances disclosed by this record 5

POINT II—No subsequent decisions of this Court have challenged the result of *First National Bank of Boston* v. *Maine* 7

POINT III—The record in this case does not warrant any attempt at a review of *First National Bank of Boston* v. *Maine* 9

POINT IV—The instant case is peculiarly inapropos for an attempt to review *First National Bank of Boston* v. *Maine,* since the Utah Statute is a transfer inheritance tax 12

CONCLUSION—The petition for writ of certiorari should be denied 12

CASES CITED

	PAGE
Baker v. Baker, Eccles & Co., 242 U. S. 394	6
Blackstone v. Miller, 188 U. S. 189	5, 6
Burnet v. Brooks, 288 U. S. 378	7
City Bank Farmers Trust Co. v. Schnader, 293 U. S. 112	7
Corry v. Baltimore, 196 U. S. 466	6
Curry v. McCanless, 307 U. S. 357	8, 9
Direction der Disconto-Gesellschaft v. U. S. Steel Co., 267 U. S. 22	11
First National Bank of Boston v. Maine, 284 U. S. 312	4, 5, 6, 7, 8, 9, 12
Frick v. Pennsylvania, 268 U. S. 473	4, 6
Graves v. Elliott, 307 U. S. 383	8, 9
Iron City Savings Bank v. Isaacson, 158 Va. 609, 164 S. E. 520	10
Lawrence v. State Tax Commission, 286 U. S. 276	7
Maxwell v. Bugbee, 250 U. S. 525	6
Montfort v. Korte, 100 F. (2) 615 (C. C. A. 7th, 1938)	10
Newell v. Tremont Lumber Co., 161 La. 649, 109 So. 344	11
Rhode Island Trust Co. v. Doughton, 270 U. S. 69	6
Senior v. Braden, 295 U. S. 422	7
Wheeling Steel Corp. v. Fox, 298 U. S. 193	7
Worcester County Co. v. Riley, 302 U. S. 292	7

STATUTES AND TEXTS

Revised Stats. of Utah (1933) 18-3-1; 18-3-13 (Uniform Stock Transfer Act)	3
39 Harv. L. Rev. 485	10, 11

Supreme Court of the United States

OCTOBER TERM 1941

No. 815

THE STATE TAX COMMISSION OF UTAH, and OLIVER G. ELLIS, State Treasurer of the State of Utah,

Petitioners,

against

ALVIN UNTERMYER, IRWIN UNTERMYER, and SAMUEL UNTERMYER, 2ND, Executors of the Estate of Samuel Untermyer, Deceased,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents are the Executors of the Estate of Samuel Untermyer, who, at the time of his death, was a resident of and domiciled in the State of New York. This brief is submitted in opposition to a petition by the State taxing authorities of Utah for a writ of certiorari to review an unanimous decision of the Supreme Court of Utah.

The Court decided that stock of the Union Pacific Railroad Company, incorporated in Utah, that was owned by the decedent and acquired and kept by him in New York, is not subject to the Transfer Inheritance Tax (not an estate tax) of Utah.

The Facts

The "Summary Statement of Matter Involved" as given in the petition omits reference to various important facts in the record.

In addition to the fact that the stockholder was at the time of his death a resident of and domiciled in the State of New York, he initially acquired the certificates in New York (R. 12). The certificates which he purchased were transferred to his name in the State of New York. They were not transferable on any books in Utah. The Union Pacific Railroad Company issued the new certificates to him in the State of New York and the registration of the certificates also occurred in the State of New York (R. 12). The books of the Union Pacific Railroad Company on which, the petition (p. 2) recites, the shares of stock were recorded in the name of the decedent at the date of death, are and have been kept at all times in the State of New York. At no time has the Company had any of its stock books and stock records in Utah (R. 12). The executive offices of the Company are and for many years have been located in the State of New York (R. 12).

At no time did the decedent ever reside or maintain any residence within Utah or conduct any business in Utah. He did not acquire the stock as the result of any business conducted by him within Utah. Neither the certificates of Union Pacific stock nor any other part of the Estate of decedent were at any time physically present within Utah (R. 12).

The Union Pacific Railroad Company operates railroad lines in thirteen states. Its operating revenue both from Utah intra-state business and inter-state business allocable to Utah was 8.97% of its entire gross railway operating revenue. Less than 9% of its total trackage is in that state (R. 13).

The shares of stock were included in the personal estate of the decedent subject to taxation in the State of New York. It is conceded that the plaintiffs will be compelled and required to pay to the State of New York a tax by reason of the death of the decedent on the Union Pacific stock as part of his Estate (R. 11-12).

In 1927, the State of Utah enacted the Uniform Stock Transfer Law, Section 1 of which reads as follows:

> "Title to a certificate and to the shares represented thereby can be transferred only:
>
> (1) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; or
>
> (2) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.
>
> The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."
>
> (Revised Statutes of Utah, 1933, Sec. 18-3-1.)

Said Act also provides:

> "No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered by the corporation which issued it, or its transfer by the holder be enjoined."
>
> (Revised Statutes of Utah, 1933, Sec. 18-3-13.)

The Question Presented

The actual question presented in this case is not as broad as suggested by the petitioners (Pet. Brief, p. 5). The problem is not the abstract question as to the power of a state to collect a transfer tax upon the transfer at death of shares of stock in corporations organized under its laws, but whether on the facts of this case as a whole, particularly in view of its own Stock Transfer Act, the State of Utah had the power to tax these shares of stock, issued in New York, acquired, kept and owned in New York by a New York resident, and transferred and transferable only in New York.

The Position of the Respondents

The State of Utah by enacting the Uniform Stock Transfer Act voluntarily yielded its jurisdiction and power over the certificates and permitted them to acquire a property status approximating that of tangible personalty. The result is that the invalidity of the asserted tax derives as much from the accepted doctrines basic to *Frick* v. *Pennsylvania*, 268 U. S. 473 as from those basic to *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

The respondents further contend that no conflict or important question is developed in this case, from recent decisions of this Court permitting taxation of intangibles held in trust by both the state of domicile and another state where both states afforded substantial protection to the trust *res*.

As against the general argument presented in the petitioners' brief for the allowance of the writ, the respondents contend that the situation in the instant case does not in any event warrant reconsideration of *First National Bank of Boston* v. *Maine*, 284 U. S. 312, even assuming that this Court should deem reconsideration thereof to be appropriate.

ARGUMENT

POINT I

No decision of this Court prior to *First National Bank of Boston* v. *Maine* permitted a tax under the circumstances disclosed by this record.

The consideration of the ability of a state within the "due process" clause to levy inheritance taxes has generated two problems which appear and reappear in the decisions of this court. One of these problems, exemplified by the tax career of intangibles since *Blackstone* v. *Miller,* 188 U. S. 189, is: Does the Fourteenth Amendment prohibit the taxation by two or more states upon the same property or interest in property? The other and more fundamental problem is whether, independently of the "double taxation" doctrine, there is sufficient nexus between the taxing state and the interest in property, or its possessor, and such degree of protection and benefit extended either to the property or to its possessor, that the state can validly levy the tax.

The second question has become especially relevant where a state attempts to tax property included in the estate of a non-resident. Not being the state of domicile and lacking therefore the reciprocal advantage of having granted the broad protection extended by a state of domicile, such a state must and should show (1) (a) that there is some actual property of the non-resident within its borders, or (b) that the non-resident is doing business within its borders, and (2) that the protection given either to such property or such non-resident is not remote, indirect, or merely formal, so that the tax becomes harsh and inequitable and violates the constitutional safeguards of the non-resident.

At page 10 the petitioners cite a series of cases for the alleged proposition that prior to *First National Bank of Boston* v. *Maine* this court had recognized the right and power of a state of incorporation to tax the transfer of stock in domestic corporations whether owned by resident or non-resident decedents.

Not one of these decisions holds that a tax under the instant circumstances would be proper.

In *Maxwell* v. *Bugbee*, 250 U. S. 525, there was no attack made on the validity of the tax on the stock as such, nor was it even claimed that the stock was not within the State of New Jersey, the state of incorporation (see *Maxwell* v. *Bugbee*, 250 U. S. 525, 534). The principal questions there decided were whether the privileges and immunities of residents were denied to non-residents and whether the non-resident had been afforded equal protection of the laws in view of certain provisions of the New Jersey Act.

In *Frick* v. *Pennsylvania*, 268 U. S. 473, the reference to the power of the state of creation was dicta and there was no showing, as in the instant case, that the certificates had been acquired and transferred on books of the corporation maintained exclusively in a state other than the state of incorporation.

The language in *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, repeats the doctrine of *Corry* v. *Baltimore*, 196 U. S. 466, and certain other cases, to the effect that a state of incorporation at the time it grants incorporation or at the time of an extension of charter, may by a special act expressly fix for taxation purposes the situs of the stock to be issued in the incorporating state, so that any stockholder who acquires such stock is put on express notice and thereby consents in advance to the taxing power.

Blackstone v. *Miller*, 188 U. S. 189 (to which *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, refers) dealt solely with the imposition of a tax by a state in which the non-resident had deposited some $4,000,000 with a trust company located in such state, which thereby directly owed the monies to the non-resident.

POINT II

No subsequent decisions of this Court have challenged the result of *First National Bank of Boston* v. *Maine*.

First National Bank of Boston v. *Maine* has been frequently cited with approval in decisions of this court which have followed or accepted the general doctrine that multiple taxation of the same interest in property by various states represents harshness and inequity sufficient to warrant unconstitutionality.

In these cases, dealing either with that proposition or the related proposition that there is only a single true situs for an intangible, *First National Bank of Boston* v. *Maine* has been cited with approval.

See:

Burnet v. *Brooks*, 288 U. S. 378, 401, 402.

Worcester County Co. v. *Riley*, 302 U. S. 292, 298:

"This Court has held that state statutes, construed to impose death taxes upon the intangibles of decedents domiciled elsewhere, infringe the Fourteenth Amendment, and it has accordingly reversed judgments of state courts enforcing such liability. *First National Bank* v. *Maine, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra*" (Opinion by the present Chief Justice).

City Bank Farmers Trust Co. v. *Schnader*, 293 U. S. 112, 116.

Senior v. *Braden*, 295 U. S. 422, 431.

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193, 209.

It has correlatively been cited with approval among cases upholding taxation of intangibles by the state of domicile. See the opinion of the present Chief Justice in *Lawrence* v. *State Tax Commission*, 296 U. S. 276, 280.

The recent decisions of this court in *Curry* v. *McCanless*, 307 U. S. 357, and *Graves* v. *Elliott*, 307 U. S. 383, went no further than to hold that where decedents had created *inter-vivos* trusts and voluntarily placed their property in other states, they thereby enjoyed substantial protection by such other states with respect thereto, resulting in a limited qualification of the theory of single situs in favor of the broader equities inherent in protection. Writing for the majority in *Curry* v. *McCanless*, the present Chief Justice referred to the authority of *First National Bank of Boston* v. *Maine*, as follows at page 363:

> "The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *First National Bank* v. *Maine*, 284 U. S. 312. Still more recently this Court has declined to give it completely logical application. It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case."

The opinion thus indicates in the strongest possible way that while this court declined to give the general doctrine completely logical application, the decision being made in *Curry* v. *McCanless* was not intended in anywise to disturb the result reached in *First National Bank* v. *Maine*.

These decisions involving the doctrine of protection, require no retroactive extension because of the fortuitous fact of incorporation in some one of our forty-eight states, without more.

The decedent in this case, unlike the decedents in *Curry* v. *McCanless* and *Graves* v. *Elliott*, did not, of course, send his Union Pacific certificates into Utah or transfer them to a trustee in Utah or otherwise localize in Utah the property interests sought to be reached.

POINT III

The record in this case does not warrant any attempt at a review of *First National Bank of Boston* v. *Maine*.

The position of the instant petitioners is much weaker than the taxing authorities of Maine who attempted to levy the tax in *First National Bank of Boston* v. *Maine*.

In that case the greater part of the property of the Massachusetts decedent consisted of shares of stock of the Great Northern Paper Company, a Maine corporation (see 284 U. S. at p. 320) and it was not impossible to suggest that the investments had acquired some kind of situs in Maine. There was no evidence presented that the Maine corporation was mostly engaged in business outside of that state, as distinguished from the instant situation in which the Utah corporation operates in thirteen states and derives most of its income from such other states. There as here Maine levied a transfer tax and not an estate tax.

In *First National Bank of Boston* v. *Maine* there was no evidence presented that any transfer of the stock could be accomplished in any jurisdiction other than the state of incorporation, whereas the stock of Union Pacific Railroad Company is transferable on books maintained exclusively without the confines of the State of Utah.

In the Maine case the record did not show, as here, the exclusivity of the state of domicile with respect to all aspects of the situation, except the one bare fact that the Union Pacific Railroad is organized in Utah.

That there was a single situs to these certificates of stock is neither a fiction nor a theory. By its general policy, and especially by the enactment of the Uniform Stock Transfer Law, the State of Utah has itself brought into being the "physical characteristics" to which the present Chief Justice referred in his dissent in *First National Bank of Boston* v. *Maine*, 284 U. S. 312, 332. By force of the Uniform Stock Transfer Act, the property right ceased to

be a true intangible; the certificates ceased to be mere evidences of obligation or of a property right—the property right was merged into the certificates themselves.

Under the common law and general corporate law as it existed at the turn of this century and for many years thereafter, a share of stock as a *res* for jurisdictional purposes generally was considered to be in the state of incorporation. But under the Uniform Stock Transfer Law the *res* has deserted the state of incorporation.

Thus in *Montfort* v. *Korte,* 100 F. (2d) 615 (C. C. A. 7th, 1938), a trustee in bankruptcy of a record stockholder sued in a district court of Indiana, the state of incorporation, to establish title to the stock, the physical certificates of which had been pledged with a Kentucky bank. The Circuit Court of Appeals held that the action was not maintainable as an action *in rem* and that the title could not be determined in view of the enactment by Indiana of the Uniform Stock Transfer Act.

Conceding the general prior doctrine of jurisdiction over shares of stock in the state of incorporation, the court said (616):

> "It becomes apparent, however, that a distinction has generally been made in states where a Uniform Stock Transfer Act is in effect. Such an act exists in Indiana."

And concluded (617):

> "it is apparent that the situs or *res* of the stock in controversy is in Kentucky rather than Indiana, and that plaintiff's theory that its action is maintainable as one *in rem,* must fail."

To the same effect see also:

> *Iron City Savings Bank* v. *Isaacson,* 158 Va. 609, 628-633, 164 S. E. 520, 526-29.

> Note "Situs of Shares of Stock," 39 Harv. L. Rev. 485-487:

> "An apparent exception to the rule that shares of stock have a *situs* at the domicile of the corporation

> is found where the Uniform Stock Transfer Act is in force. This enactment merges the shares into the certificate so that the state dealing with the certificate has power to affect the shares independently of the state of the corporate domicile. But this power really rests on the will of the state of domicile which by adopting the Transfer Act concedes the jurisdiction over the shares to the state where the certificate is found."

In *Newell* v. *Tremont Lumber Co.*, 161 La. 649, 109 So. 344, a case involving a state inheritance tax statute, the court concluded that the statute did not cover the devolution of stock in a Louisiana corporation owned by a decedent domiciled in Illinois in view of the adoption by Louisiana of the Uniform Stock Transfer Law, saying:

> "For under the provisions of that statute [the Uniform Stock Transfer Law] no *title* to shares of stock in a corporation can be acquired or held by anyone, in any way, adversely to the bona fide *holder* of the certificate of stock duly endorsed. See sections 1, 8, 10 and 13. The *transferable value* of the stock lies therefore wholly *in the certificates;* and thus the certificates are by law made the corporeal or physical representatives of the stock itself, so that, where said certificates are, there also the stock itself is physically located." (Italics by the Court.)

Mr. Justice Holmes had occasion comparatively recently to conclude that the State of New Jersey had under its corporate law so merged the certificate and the share interest itself that determination of its ownership was subject only to the laws of the situs of the certificate. As a result certain German corporations who sued the United States Steel Corporation in New Jersey, the state of its incorporation, to establish their title to stock in that corporation which had been seized by the public trustee in England as enemy property, were held bound by the action of England, the place where the certificates had been found. *Direction der Disconto-Gesellschaft* v. *U. S. Steel Co.*, 267 U. S. 22.

POINT IV

The instant case is peculiarly inapropos for an attempt to review *First National Bank of Boston* v. *Maine*, since the Utah Statute is a transfer inheritance tax.

It is accepted doctrine that a transfer tax is based upon the right of beneficiaries to inherit, as distinguished from the right of a decedent to transmit. Whatever jurisdiction Utah may or may not have had over the decedent or his property and the correlative right of transmission, it must be conceded that the State of Utah could under no possible theory extend its jurisdiction over the beneficiaries or their right to inherit under the laws of the State of New York. As Justice Pratt of the Supreme Court of Utah so aptly stated in his concurring opinion (R. 22):

> "In the present case, the right of transmission is granted by a state other than Utah; and, not only that, but the exercise of that right occurs in that other state. The successful transmission of decedent's interest in the corporation to the heirs or legatees is not contingent upon any law of this state. Utah has not conferred the benefits of that right of transmission."

In view of all the foregoing circumstances, it is beyond the power of the State of Utah to invoke the single fact of incorporation in Utah to support the imposition of a transfer tax upon a non-resident shareholder with respect to certificates of stock so completely associated and fixed in the state of domicile.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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